

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

EMPLOYEES' RETIREMENT PLAN OF
CONSOLIDATED ELECTRICAL
DISTRIBUTORS, INC., an employee
pension benefit trust,

Plaintiff,

vs.

Case No. 2014-947-CB

HARBOR THIRTEEN MILE – 20600 LLC,
a Michigan limited liability company, and
CRAIG SCHUBINER,

Defendant.

OPINION AND ORDER

This matter is before the Court after a bench trial. The Court will now render findings of fact and conclusions of law.

I. Factual and Procedural History

This matter arises out of a loan evidenced by a series of promissory notes executed by Defendants Harbor Thirteen Mile-20600, LLC ("Defendant Harbor") beginning with a note executed in favor of Plaintiff's predecessor in interest, Charter One Bank, N.A. ("Charter"), in the amount of \$4,040,000.00 on August 28, 1998 ("Loan"). The Loan was executed in order to acquire commercial real property located at 20600 13 Mile Rd, Roseville, MI ("Subject Property"), and was secured by a mortgage on the Subject Property ("Mortgage"). The Loan was also secured by a guaranty executed by Defendant Craig Schubiner ("Defendant Schubiner") on the same day, wherein Defendant Schubiner

guaranteed repayment of only up to 25% of the Loan amount upon the execution of a satisfactory lease.

The Loan was subsequently amended several times. On July 5, 2000, Defendant Harbor executed a modification agreement to the Loan to increase the principal to \$4,490,000.00 ("First Amended Loan") for tenant improvements. On July 30, 2002, Defendant Harbor executed a second modification to increase the principle to \$4,600,000.00 for additional tenant improvements. On the same date, a "Restated and Amended Promissory Note and Modification of Mortgage, and a Restated Guaranty" (collectively, "Restated Loan Docs") were also executed. The Restated Guaranty removed the 25% cap.

On May 31, 2005 Charter assigned the Restated Loan Docs to Plaintiff. On October 31, 2011, the parties executed a "Second Restated and Amended Promissory Note" for a decreased principle of \$3,410,710.14. On October 31, 2012, the parties executed a "Modification of Loan Documents" that extended the maturity date of the loan to February 1, 2013. On October 29, 2013, the parties executed a "Third Restated and Amended Promissory Note" that further decreased the principle loan balance to \$3,137,212.82. The parties also executed a "Second Modification of Loan Documents" that extended the maturity date to August 1, 2014.

In its complaint, Plaintiff alleged that Defendant Harbor failed to make the required monthly payments under the loan documents, and is therefore in default. Plaintiff thereafter accelerated the balance and demanded repayment in full. Defendant Harbor failed to pay as demanded. In its first amended complaint ("Complaint"), Plaintiff alleges claims for: Count I- Claim and Delivery against Defendant Harbor, Count II- Breach of

Contract against Defendant Harbor and Breach of Guaranties against Defendant Schubiner, and Count III- Appointment of a Receiver over Defendant Harbor. Plaintiff's claims against Defendant Harbor have since been dismissed with prejudice pursuant to a February 4, 2016 stipulated order of dismissal.

On January 12, 2016, the Court issued its Opinion and Order, *inter alia*, granting Plaintiff's motion for summary disposition as to the Count II against Defendant Schubiner, which is the only claim remaining open in this case. Specifically, the Court held that Defendant Schubiner was liable under his guaranties, as reaffirmed in the Second Modified Loan Docs. The Court has since denied Defendant Schubiner's motion to reconsider the January 12, 2016 Opinion and Order. Liability having been decided, the issue of damages was heard at a February 1, 2016 bench trial. Having concluded the hearing and reviewing the materials and testimony presented by the parties, the Court is now prepared to render its decision.

II. Arguments and Analysis

The Court, in its January 12, 2016 Opinion and Order, has previously held that Defendant Schubiner's liability is governed by the October 29, 2013 Second Modification of Loan Documents ("10/13 Modification") and the other loan documents incorporated therein. Specifically, the 10/13 Modification contains a reaffirmation of Defendant Schubiner's obligation to guaranty the payments and all of the other undertakings, promises and agreements provided in the loan documents between Plaintiff and Defendant Harbor. (See Trial Exhibits A, 2, 3 and 7.) In this case, Plaintiff seeks to recover seven categories of damages from Defendant Schubiner. The first category is the principal balance owed. It is undisputed that Defendant Harbor is liable for the

payments under the 10/13 Modification, that the last payment made pursuant to the 10/13 Modification was on December 16, 2013, and that the principal balance after that payment was made was \$3,033,259.52. (See Trial Exhibit 11.) As it is undisputed that Defendant Harbor was responsible for the repayment of \$3,033,259.52 remaining balance, the Court is satisfied that Defendant Schubiner, as the guarantor of Defendant Harbor's obligations under the 10/13 Modification is liable for that balance. Consequently, Plaintiff's request to include the outstanding principal balance into the judgment in this matter will be granted.

Plaintiff also contends that it is entitled to recover a late charge pursuant to paragraph 3.4 of the October 29, 2013 Third Restated and Amended Promissory Note ("Third Restated Note"). Paragraph 3.4 provides:

Late Charge. If any payment of interest or principal due hereunder is not made within fourteen days after such payment is due in accordance with the terms hereof, then, in addition to the payment of the amount so due, [Defendant Harbor] shall pay to [Plaintiff] a "late charge" of five cents for each whole dollar so overdue to defray part of the cost of collection and handling of such payment. Borrower agrees that the damages to be sustained by the holder hereof for the detriment caused by any late payment are extremely difficult and impractical to ascertain, and that the amount of five cents for each one dollar due is a reasonable estimate of such damages, does not constitute interest, and is not a penalty.

(See Trial Exhibit 6.)

The 10/13 Modification provides that the "Loan Documents" continued to be in full force and effect and continued to be binding on Defendant Harbor notwithstanding the modifications set forth in the 10/13 Modification. (See Trial Exhibit 7, at ¶ 6(c).) The term "Loan Documents" includes the Third Restated Note. (Id., at Recitals K & L.) Consequently, the terms of the Third Restated Note, including ¶ 3.4 continued to be in full force and effect notwithstanding any modifications made by the 10/13 Modification to

other sections of the Third Restated Note or its predecessor notes. Plaintiff has requested \$10,793.45 in late charges, which is 5% of the cumulative total of the missed payments between November 2013 and April 2014. (See Trial Exhibit 11.) The Court is convinced that such charges are authorized by the Third Restated Note, and that Defendant Schubiner is responsible for such charges under the reaffirmation of his guaranty in the 10/13 Modification.

The next categories of damages at issue is interest. The 10/13 Modification provides that interest shall be due and payable as set forth in the Third Restated Note. (See Trial Exhibit 7, at ¶2.) The Third Restated Note provides for interest at an annual rate of 6.6% prior to default. (See Trial Exhibit 6, at ¶2.1) Further, the Third Restated Note provides that after default the interest rate is increased to 16.6% (Id. at ¶2.2) A default under the Third Restated Note includes the failure to pay any required payment within 14 days after the date such payment is due after the expiration of any grace period. (See Trial Exhibit 6, at ¶5.1.) The Third Restated Note requires monthly payments to be made on the first business day of each month. (Id. at 3.1(a).) As the last month a payment was made was December 2013, the first default occurred in January 2014. Consistent with this analysis, Plaintiff seeks to recover interest at the 6.6% rate for December 2013 and at 16.6% thereafter. (See Trial Exhibit 11.)

As discussed above, the Court is satisfied that Defendant Schubiner is liable for all of the payments, undertakings, promises and agreements provided in the loan documents between Plaintiff and Defendant Harbor. (See Trial Exhibits A, 2, 3 and 7.) One such obligation is to pay interest as provided in the Restated Third Note.

Consequently, Plaintiff's request for interest in the amount set forth in Trial Exhibit 11 will be granted.

The fourth and fifth categories of damages Plaintiff seeks to recover is the insurance payments and real estate taxes it has paid as a result of Defendants' failure to make the payments. In support of its request, Plaintiff relies on the Mortgage. Section 4 of the Mortgage requires Defendant Harbor to maintain various policies of insurance. (See Trial Exhibit 12, at ¶4.) Further, section 2 of the Mortgage requires Defendant Harbor to make monthly payments to Plaintiff for the payment of real estate taxes and insurance premiums. (Id. at ¶2.)

In this case, it appears undisputed that Defendant Harbor nor Defendant Schubiner made the required real estate or insurance premium payments. Plaintiff has presented evidence that it has paid \$4,009.00 to maintain the required insurance on the Subject Property and has paid \$129,574.51 in real estate taxes in connection with the Subject Property. Section 15 of the Mortgage authorizes Plaintiff to perform any obligation or covenant that Defendant Harbor is required to perform but fails to satisfy. (See Trial Exhibit 12, at ¶15.) Further, paragraph 15 provides that Defendant Harbor, upon demand, shall reimburse Plaintiff for all such expenditures it incurred in satisfying Defendant Harbor's obligations and/or covenant. (Id.) Defendant Schubiner, in the Amended and Restated Guaranty, as reaffirmed in the 10/13 Modification, has guaranteed all undertakings, promises and agreements as contained in the Loan Documents, which includes the Mortgage. (See Trial Exhibits 3, at p. 3, and 7 at ¶8.) Consequently, Defendant Schubiner is responsible for reimbursing Plaintiff for real estate taxes and insurance premiums it has paid.

Plaintiff also seeks to recover the utility costs it has paid in connection with the Subject Property. However, the only authority it has cited in support of its request is section 4 of the Mortgage, which does not mention utilities in any way. (See Trial Exhibit 12.) Consequently, the Court is convinced that Plaintiff has failed to establish that it is entitled to recover the amount it paid for utilities.

Finally, Plaintiff requests attorney fees and costs. The Third Restated Note provides that Defendant Harbor promises to pay all costs of collection, including reasonable attorney fees. (See Trial Exhibit 6, at ¶8.9.) While the Court is convinced that, for reasons discussed above, Defendant Schubiner is liable for all promises Defendant Harbor made in the loan documents, including the promise to pay reasonable costs of collection under ¶8.9 of the Restated Third Note, Plaintiff has not provided the Court with any invoices or other evidence that the fees and costs it seeks to recover are reasonable. The parties have agreed that an evidentiary hearing on the issue of reasonableness is needed. Consequently, the Court will reserve this issue pending the conclusion of an evidentiary hearing.

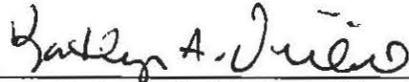
IV. Conclusion

Based upon the reasons set forth above, Plaintiff is entitled to a judgment against Defendant Craig Schubiner. Specifically, Plaintiff is entitled to recover the outstanding loan balance of \$3,033,259.52, outstanding interest in the amount of \$1,081,626.64, property taxes in the amount of \$129,574.51, late charges of \$10,793.45, and insurance premiums of \$4,009.00. Further, Plaintiff is entitled to recover reasonable attorney fees. The total of such fees will be addressed at a hearing hereby set for April 22, 2016 at 1:30 pm. Plaintiff shall serve Defendant's counsel with all invoices and other documentation it

will rely upon in support of its request no later than fourteen days prior to the date of the hearing. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case, as the issue of attorney fees remains open.

IT IS SO ORDERED.

Date: MAR 10 2016



Hon. Kathryn A. Viviano, Circuit Court Judge